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In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ACME PROCESS EQUIPMENT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims entered in this case on June 11, 1965.

OPINIONS BELOW

The opinion of the Court of Claims (App., *infra*, pp. 1–42) is reported at 347 F. 2d 509. The findings of the Court of Claims (App., *infra*, pp. 42–144) are unreported.

JURISDICTION

The opinion and order of the Court of Claims were entered on June 11, 1965. A timely motion for reconsideration was denied on October 15, 1965. By orders of the Chief Justice and Mr. Justice Brennan, entered

on January 12, 1966, and February 9, 1966, the time for filing a petition for a writ of certiorari was extended to and including March 14, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).[1]

QUESTIONS PRESENTED

1. Whether, when the government is found to be in breach of contract, the contractor may obtain "restitutional" recovery of all the reasonable expenses he has incurred under the contract, even though (since the contract was not a profitable one for the contractor) this places him in a better position than he would have been in if the contract had not been terminated by the government.

2. Whether the discovery of violations of the Anti-Kickback Act between subcontractors and officials of a prime government contractor is a ground for terminating the prime contract.

STATUTES INVOLVED

The Tucker Act, 62 Stat. 940, as amended, 28 U.S.C. 1491, provides in relevant part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United

[1] Although the decision of the Court of Claims is interlocutory in the sense that it does not finally grant or deny relief, this Court has jurisdiction under 28 U.S.C. 1255(1). *United States* v. *Caltex, Inc.*, 344 U.S. 149; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155.

States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Anti-Kickback Act, 60 Stat. 37, as amended, 41 U.S.C. 51, provides, in relevant part:

> The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, * * * (1) to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; * * * as an inducement for the award of a subcontract or order from the prime contractor * * * is prohibited. The amount of any such fee, commission, or compensation or the cost of expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor * * *. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by setoff of moneys otherwise going to the subcontractor either directly by the United States, or by a prime contractor under any contract or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor * * * in connection

with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. Upon the direction of the contracting department or agency or of the General Accounting Office, the prime contractor shall withhold from sums otherwise due a subcontractor any amount reported to have been found to have been paid by a subcontractor as a fee, commission, or compensation or as a gift or gratuity to an officer, partner, employee, or agent of the prime contractor or another higher tier subcontractor.[2]

STATEMENT

1. *The Contract.* On January 27, 1953, the Army Ordnance Corps awarded respondent, Acme Process Equipment Co., a contract for the manufacture of .75mm recoilless rifles (F. 13; App. p. 50).[3] Prior to

[2] Prior to its amendment in 1960 (74 Stat. 740), this Act applied only to contracts "on a cost-plus-a-fixed fee or other cost reimbursable basis." 60 Stat. 37.

[3] "F" refers to the Findings of the Court of Claims, App., *infra*, pp. 42–144.

The contract price was $337.23 per rifle, subject to revision, with a ceiling of $384.95 per rifle. Competing bids had been obtained, including bids of $423 and $484.05 per rifle. The government contracting officials were concerned over Acme's ability to produce the rifle at the price quoted in its bid, especially in view of the fact that it did not have previous experience in the field. Accordingly, Acme was offered the opportunity to withdraw its bid. Acme refused this opportunity. Accordingly, the higher competing bids were rejected, and the contract awarded to Acme, after the Army determined that, although Acme's bid was low, it was reasonable and attainable in light of all the factors then known. (F. 7, 9, 10; App. pp. 45, 48–49).

that time—in October, 1952, before the prime contract was negotiated—Acme had hired Harry Tucker, Jr., and his associate, James Norris, for the purpose of establishing and managing a new division of the company to handle government contracts. Norris was made general manager of production, with authority to submit bids, sign government contracts, and award subcontracts; Tucker was placed in charge of sales, government contracts, and expediting subcontract operations (F. 3, 16; App. pp. 43, 55).

Before the execution of the prime contract, Tucker entered into contracts with three companies providing that Tucker was to receive commissions (which he shared with Norris) on subsequent sales by these companies to Acme. After entering into this "kickback" arrangement, one of these companies participated in negotiation conferences between Acme and the Army which led to the award of the prime contract (F. 19; App. p. 56), and, within a few weeks after the award of the prime contract, each of these three companies was awarded subcontracts by Acme. (F. 18, 19, 22, 23; App. pp. 56–58, 61–63). A fourth company obtained subcontracts from Acme after having agreed to pay commissions to Tucker's father, and a fifth company obtained an Acme subcontract upon the recommendation of Philip Chagnon, who was on Acme's payroll as Norris's assistant. This company had a kickback agreement with Chagnon (F. 24, 25; App. pp. 63–64).

Within a month after the award of the prime contract, Jack Epstein, who was the superintendent of an Acme plant and the son of Acme's president and principal stockholder, entered the kickback conspiracy. Epstein threatened cancellation of a principal subcontract unless the subcontractor paid him $25,000. It was thereafter arranged that $23,500 would be paid to a dummy corporation owned by Tucker, Norris and Epstein for fictitious consulting services; this amount was charged to Acme through an increase in the subcontract price (F. 1, 20, 21; App. pp. 42, 58–61).

Other officials of Acme were not on actual notice of the kickback activities of Epstein, Tucker, Norris and Chagnon until the late summer and fall of 1953 (F. 30; App. p. 65). Tucker's employment contract with Acme, however, specifically stated that he represented and would continue to represent firms in other lines of business; Acme did not consult with these other clients at the time Tucker was hired (F. 3, 5; App. pp. 43, 44). Moreover, during the negotiation of the prime contract, Army officials advised Acme that Tucker's father was suspected of "five-percenter" activities. Joshua Epstein, Acme's president, instituted no further investigation at that time (F. 8(d), 30; App. pp. 47, 65). When Joshua Epstein ultimately came to suspect improper activities, he caused the resignation of the employees involved (F. 26–30; App. pp. 64–65).

Tucker, Norris and Jack Epstein were subsequently indicted for violation of the Anti-Kickback Act, 60 Stat. 37 (F. 31; App. p. 31). After presentation of the government's case, the defendants' mo-

tion for acquittal was granted on the ground that the Act—which at that time covered only "cost-reimbursable" government contracts[4]—did not apply to the contract here involved, which was a fixed-price contract with a provision for price redetermination subject to a ceiling price.[5] The district court characterized the defendants' conduct as "despicable and morally reprehensible, but unfortunately within the narrow letter of the law" (F. 54(j); App. p. 128). Amendatory legislation was recommended by the Comptroller General (H. Rep. 1880, S. Rep. 1585, 86th Cong. 2d Sess.) and the Act was amended retroactively in 1960 to apply to all negotiated contracts, including contracts such as the one in this case (74 Stat. 740; 41 U.S.C. 51).

From January, 1953, onward, Acme engaged in work on the contract. The contract did not prove profitable for Acme; its cost of production proved to be more than double the maximum price specified by the contract (F. 52; App. pp. 116–118). Although delivery schedules were extended, Acme fell behind those schedules, and liquidated damages were assessed under the liquidated damages clause of the contract (F. 14, 46; App. pp. 51, 109–111). By the end of July, 1954, 1,163 rifles had been delivered (F. 14; App. p. 51). On July, 1954, shortly after the Army

[4] See footnote 2, *supra*, p. 4.

[5] The Court of Appeals for the Tenth Circuit, contrary to the district court's decision, applied the Act in 1958 to a price redetermination contract. *United States* v. *Barnard*, 255 F. 2d 583, certiorari denied, 358 U.S. 919.

learned of the kickbacks, it suspended the contract; the contract was cancelled a month later for "statutory violations" (F. 47, 49; App. pp. 111, 113–114).[6]

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[6] In addition to the kickback violations, the Army found that Acme had violated the False Claims Act (31 U.S.C. 231) and was guilty of conspiracy and common-law fraud (F. 49; App., pp. 113–114). The Army also determined that there had been violation of Acme's contractual and statutory warranty against contingent-fee arrangements (10 U.S.C. 2306(b)). These contingent fee arrangements, like the kickbacks, involved Tucker and Norris. Acme hired Tucker in October, 1952, to solicit bid invitations from private firms and the government and agreed to pay Tucker a commission of 5 percent on resulting gross weekly sales up to $10,000 and 3 percent of sales over $10,000. Tucker agreed to split this commission with Norris. In its original bid, which was submitted by Norris as General Manager of Acme's Defense Work Department, and later on December 18, 1952 (one month before award of the prime contract), Acme executed government forms which represented that Acme "has not employed or retained a company or person (other than a full-time employee) to solicit or secure this proposed Contract" (F. 5, 8(a); App., pp. 44, 45–46).

Subsequently, on March 2, 1953, Acme hired Tucker and Norris on a full time basis, with part of their compensation depending upon the receipts of the plant at which the government contract was to be performed. On May 18, 1953, Acme, in response to a question as to Tucker's status, noted that he had been originally hired on a part-time commission basis, but as of "January 1953" (*i.e.*, the time Acme's contract was executed) he had gone on a full-time, non-commission employment (F. 8(f) and 9; App., pp. 47–48). The fact that Acme had been in violation of its contractual warranty against contingent fees for at least the first two months of its performance of the contract was not disclosed by that letter (F. 8(f); App., p. 47).

While the Court of Claims affirmed the Army's determination that both the False Claims Act and the contingent-fee warranty had been violated, it held that neither violation afforded a ground for termination of Acme's contract. See footnote 8, *infra*, p. 10.

2. *Proceedings Below.* In 1957, after failing to obtain an administrative settlement, Acme brought this action, alleging that the government's cancellation was a breach of contract, and seeking "full restitution of its costs" or, alternatively, damages. Acme contended that the Army had used the statutory violations as an excuse to mask the real reason for cancellation—the fact that 75 mm. recoilless rifles had become obsolete (F. 47; App. p. 111). The Court of Claims, however, found that the obsolescence of the rifles and Acme's illegal activities were both reasons for cancellation, and that either one of these reasons would have sufficed in the absence of the other (F. 50(a), App. pp. 114–115). Accordingly, the court explicitly rejected Acme's contention that the government had acted in bad faith (App. pp. 40–41).

The court found that Acme employees had accepted kickbacks (F. 18–25; App. pp. 56–64). The court held, however, that these activities did not justify cancellation of the contract and, hence, that the government was liable for breach of contract for cancelling the contract in July, 1954. The court reasoned that the Anti-Kickback Act provided for a specific civil remedy—recovery of the kickbacks—in addition to criminal sanctions, and that any further civil remedy was impliedly negatived. On this basis the court distinguished *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (the *Dixon-Yates* case), where the violation which was held to justify cancellation of a government contract involved a statute which provided only a criminal remedy. The court also concluded that the kickbacks here, unlike those in

the *Dixon-Yates* case, were not related to the negotiation and execution of the prime contract and thus did not taint the entire transaction, and that, unlike *Dixon-Yates*, the conspirators here had defrauded Acme as well as the government.[7] Finally, the court found it relevant that, although the 1960 amendment to the Anti-Kickback Act—which was concededly intended to apply to prior events—clearly covered these kickbacks, the application of the original Act to the government contract here involved was "highly questionable" (App. pp. 9–15).[8]

With regard to Acme's remedy, the Commissioner of the Court of Claims rejected Acme's contention that it was entitled to full restitution of its costs and held that the proper remedy was to award Acme the damages actually suffered by the government's

[7] Thus the court held that the conspirators' actions were not chargeable to Acme despite their responsible positions in the company. The court found that "it can scarcely be said that *plaintiff* (as distinguished from its agents) violated 'obvious ethical or moral standards'" (App., p. 14). In the court's view the *Dixon-Yates* case was different, because there the contractor "was not altogether innocent, since it was well aware of the possible conflict of interest" (App., p. 15).

[8] The court also found that Acme had violated the contractual covenant against contingent fees (F. 3–5, 9; App., pp. 43–44, 48; see footnote 6, *supra*, p. 8) and the False Claims Act. As to the contingent-fee violations, the court held that the government's delay in cancelling after learning of violations justified enforcement of the contract (App., pp. 3–9). As to the False Claims Act, the court found that the government had not shown intent to defraud, and that such intent was necessary to justify non-enforcement on this ground (App., pp. 19–25). We do not seek certiorari to review these aspects of the decision below.

breach, *i.e.*, to place Acme in the same financial position it would have been in if the government had not cancelled the contract (App. p. 25). While Acme had sustained a large loss on the contract (F. 14, 52. App. pp. 116–118), the Commissioner found that a portion of this loss would have been recouped during completion of the contract. The Commissioner therefore concluded that Acme should recover its post-cancellation expenses ($11,597) plus the difference between its loss on the completed portion of the contract ($673,053) and the amount it would have lost on the entire contract had it not been cancelled ($550,409) (Commissioner's opinion R. 88–96).

The Court of Claims reversed this determination as to the proper measure of damages. It held that Acme was not limited to recovery which would put it in the position in which it would have been had the contract not been cancelled; instead, it ruled, Acme was to be returned to the *status quo* before the contract, by recovering the value of the services it rendered under the contract, without regard to the contract price. The value of Acme's services, the court held, was to be measured by Acme's actual costs—far in excess of the contract price [9]—except to the extent that the government could show these costs to be excessive. The effect of the court's decision was thus to place Acme in a far better position than it would have been in

[9] The contract price was $384.95 per rifle (see F. 7, 13, App., pp. 45, 50). Acme spent $1,179.29 per rifle for the first 446 rifles and $690.21 for the remaining 717 rifles delivered prior to cancellation (F. 14, 52, App., pp. 51, 116–118).

had there been no cancellation of the contract by the government.

REASONS FOR GRANTING THE WRIT

The Court of Claims in this case has adopted a new measure of recovery in government contract cases, which awards the contractor sums beyond the damages which can be attributed to the government's asserted breach. This rule runs counter to valid procurement policies adopted by the Congress. The rule is likely, moreover, to have a substantial adverse financial impact upon the government in the administration of its procurement program. At the same time, the rule results in a windfall to the contractor. It permits recoveries potentially far in excess of the compensation the contractor would have received had the contract been fully performed by the government, and it is therefore wholly unjustified by any considerations of fairness or equity. In these circumstances, we believe that review by this Court is appropriate.

On the merits, the Court of Claims has ruled that patent violations of the Anti-Kickback Act by the executives of a prime contractor do not justify the government in cancelling the contract. This holding, in our view, dilutes the rule established in this Court in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, which sought to guarantee the integrity of the federal contracting process from corrupt conduct. The practical impact of this decision is also substantial. The Anti-Kickback Act applies to all of the government's negotiated contracts, which amount to more than $25 billion a year. By depriv-

ing the government of an important remedy against kickback violations, the decision at once threatens to increase the government's total costs and to lessen the incentive of government contractors to enforce honesty among their employees. For these reasons, we also ask the Court to review the correctness of the Court of Claims' interpretation of the Anti-Kickback Act.

1. The Court of Claims has held that, where the government is in breach of contract and the contractor is thereby prevented from completing performance, the contractor may require the government to reimburse him for all reasonable costs he has incurred.[10] Where, as in this case, the contract is not a profitable one for the contractor (because the contractor's costs would have exceeded the contract price), the result of the court's holding is thus (i) to place the contractor in a better position that he would have occupied had there been no breach, and (ii) to require the government to pay a price exceeding both the price set forth in the contract and the damage actually sustained by the contractor as a result of the breach.

This rule violates the explicit procurement policy that, where feasible, government supplies and services be purchased on a fixed-price basis after either competi-

[10] The new remedy apparently applies to any government contract which contemplates that certain parts of the contract will be performed by the contractor and will not be subcontracted—at least where the government has a reason for wishing a particular contractor to perform the work (see App., p. 28).

tive bidding or negotiation (10 U.S.C. 2306(c)).[11] The federal policy in favor of fixed-price contracts is also expressed in standard default and termination-for-convenience clauses, present in the contract in this case (F. 15, App. p. 15). These clauses limit the contractor's recovery, in cases where the government improperly terminates the contract, by reference to the contract price.[12] A rule of recovery which enables the contractor to disregard the contract price in recovering for his costs in excess of the contract rate stands in square conflict with these fixed-price policies.

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[11] Where, as here, the contract is negotiated, the contracting official is required by regulation to obtain as many quotations as possible in order to arrive at the best possible terms for the government. (See 10 U.S.C. 2304(g); 32 C.F.R. 3-801.1 (1965); cf. 32 C.F.R. 1.301 (1954); see, also, *Paul* v. *United States*, 371 U.S. 245, 252-253). As to the preference for a fixed-price contract, the present regulation states: "whenever a reasonable basis for firm pricing exists * * *, the firm fixed-price contract shall be used, because its use under these circumstances will provide the contractor with a maximum profit incentive to control the costs of performance." 32 C.F.R. 3.402(b) (1965). The regulations in effect in 1953, when the contract here involved was executed, required use of fixed price contracts for negotiated procurements "unless conditions necessitate" otherwise. 32 C.F.R. 3.401 (1954). In addition, the regulations in 1953, and the present regulations, set forth a number of limitations on the use of cost-reimbursable contracts. 32 C.F.R. 3.405 (1965); 32 C.F.R. 3.405, 3.405-1, 3.406, 3.406-1 (1954).

[12] The standard default clause states that if the government's termination for default is improper because the contractor's default was excusable, recovery shall be measured by the termination for convenience clause. 32 C.F.R. 7.103-11 (1954); 32 C.F.R. 7.103-11, 8.707 (1965). The termination for convenience clause specifies that the contractor is to receive the contract price for items delivered, plus its costs for uncompleted portions of the contract limited by reference to the contract price. 32 C.F.R. 7.102-21, 8.701(e) (1954); 32 C.F.R. 7.103-21, 8.701(e) (1965).

This inconsistency is dramatically illustrated by the facts at hand. Acme was awarded the contract, after competitive quotations were obtained, at a price of $337.23 per rifle, subject to upward or downward revision, with a ceiling price of $384.95 (F. 7; App. p. 45). Other bids of $423, $484.05 and $684 per rifle were rejected (*ibid.*). Under the Court of Claims' rule, however, the government is now to be charged Acme's costs of $1,179.29 for each of the first 446 rifles it received, and $690.21 for the remaining rifles delivered prior to cancellation (F. 52(a), (c); App. pp. 116–118; see also *supra*, p. 30) except to the extent that the government can show these costs to have been excessive or illegal.

To be sure, as the Court of Claims pointed out (App. p. 28), the contract contemplated that the government, in addition to getting the rifles, would receive the benefit of having Acme as an additional competitor to established companies in the rifle field. This additional benefit was, however, part of the bargain for which the government agreed to pay the contract price; it is certain that Acme would not have been awarded the contract at the prices the Court of Claims now proposes to pay the contractor. In these circumstances, the government should not be required to compensate Acme in excess of the contract price.[13]

[13] It is true that there may be circumstances in which a contractor will be entitled to recover damages caused by the government's breach of contract in excess of the contract price for the goods and services to be received under the contract. This situation will occur where the government's wrongful conduct makes the contractor's performance more expensive than if the government had performed as promised. Damages beyond the contract price are justified in such a case in order to place the contractor in the position in which he would

We also challenge the decision as a matter of general contract law. While the cases are in some conflict, the federal cases have generally confined "restitutionary" recovery to the price specified in the contract.[14] Those situations in which recovery is allowed beyond the contract price are cases where the party responsible for the breach has derived some benefit by his breach which he must return in order to avoid unjust enrichment. In this case, the government was in no sense unjustly enriched, for it paid the contract price for the benefits it received. It is, moreover, only in an extremely technical sense that the United States can be said to have been at fault.[15] Acme and

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have been had the contract been properly performed. See *United States* v. *Penn Foundry*, 337 U.S. 198, 208–209. The remedy which the Court of Claims now proposes to grant, however, is unrelated to, and far in excess of, the damages to the contractor resulting from the government's asserted breach; its remedy constitutes a windfall by putting the contractor in a better position than he would be in if the contract had been fully performed.

[14] See *L. Albert & Son* v. *Armstrong Rubber Co.*, 178 F. 2d 182 (C.A. 2). While the language of the Restatement of Contracts, on which the Court of Claims primarily relied, offers some support for the rule adopted by the court, we believe that the Restatement does not contemplate contracts, such as the standard government contracts, which explicitly limit recovery in event of termination by the government by reference to the contract price. See footnote 12, *supra*, p. 14.

[15] "Restitutional" recovery in excess of the contract price should be allowed, if at all, only where the defendant bears the major responsibility for the situation. See Palmer, *The Contract Price as a Limit on Restitution for Defendant's Breach*, 20 Ohio State L.J. 264, 278–9: "There are strong claims in favor of (a) allowing restitution of benefits conferred on another at his request and (b) of holding parties to their contracts; which claim is paramount should depend on a finding as to which party bears the major fault for the situation that has arisen."

its chief executive officers, by accepting kickbacks in violation of a criminal statute, were the primary wrongdoers. The government cancelled the contract on account of these violations, and the Court of Claims specifically found that in so doing the government acted in good faith (App. pp. 40–41).

2. We believe that the ruling of the Court of Claims that discovery of Acme's violations of the Anti-Kickback Act (41 U.S.C. 51 *et seq.*) did not justify the government's cancellation of the contract, seriously limits the scope of this Court's ruling in *United States v. Mississippi Valley Co.*, 364 U.S. 520 (the *Dixon-Yates* case). In that case the contractor was denied enforcement of a contract because of a violation of a conflict-of-interest statute by a government employee who was also an agent of a potential subcontractor. This Court's ruling that the contract should not be enforced was intended "to guarantee the integrity of the federal contracting process and to protect the public from the corruption which might lie undetectable beneath the surface of a contract conceived in a tainted transaction." 364 U.S. at 565.

The present situation differs from *Dixon-Yates* chiefly in the facts that here the conduct was engaged in solely by employees of the contractor, and that the corruption was not merely potential. As in *Dixon-Yates,* kickbacks are typically related to the negotiation and execution of a contract. In this case, for example, the Court of Claims' findings show that one of Acme's principal subcontractors—All Metals Industries, Inc.—participated in the negotiation of the principal contract at a time when it had a kickback

agreement with Tucker and that, in the course of the negotiations leading to execution of the prime contract, government representatives reviewed a complete cost breakdown of the bid, including a list of proposed subcontractors (F. 10, 18, 19, App. pp. 48–49, 56).

Nor does the fact that the Anti-Kickback Act, unlike the statute in *Dixon-Yates,* contains an explicit civil remedy—the recovery by the government of amounts paid out as kickbacks—call for the abrogation of the remedy of contract termination. Recovering the kickback alone does not adequately secure the integrity of the contracting process. Kickback arrangements affect the choice of subcontractors and they may inflate the price charged by subcontractors—a cost passed on to the government—well beyond the amount of the kickbacks paid to employees of the prime contractor. Moreover, kickbacks are by their nature secret, and, like other kinds of corruption, difficult to prove in amount. Thus non-enforcement is necessary, both to relieve taxpayers of the unjustifiably high—but unascertainable—extra expense of contracts which have been influenced by kickback corruption, and to provide an effective incentive for contractors to take measures to prevent kickback violations on the part of their employees. We note in this connection that there is no suggestion in the legislative history of a purpose to make the remedy of recovery of the kickbacks the exclusive civil remedy,

but merely to insure the right to such recovery in addition to the remedies ordinarily available against corrupt conduct.[16]

The Court of Claims also sought to absolve Acme of responsibility for the illegal kickback activities of its high ranking executives on the ground that the executives defrauded Acme as well as the government (App. pp. 13, 14). The court itself found, however, that kickbacks were taken by the general manager of Acme's chief plant (who was also the son of Acme's president and principal stockholder and a stockholder in his own right), as well as by the Acme officials in charge of operations, sales and government contracts (F. 16, 20; App. pp. 55, 58). Having chosen these officials to conduct its government contract business, Acme may properly be held responsible for their actions, even if designed to benefit themselves rather than Acme. *Gleason* v. *Seaboard Ry.*, 278 U.S. 349, 354–355; *Standard Surety & Cas. C.*, v. *Plantsville Nat. Bank*, 158 F. 2d 422, 424–425 (C.A. 2). Any other rule would undermine the contractor's incentive to insure the integrity of its employees.

Finally, the Court of Claims in some measure rested its refusal to apply the Anti-Kickback Act in this case on the proposition that it is "highly questionable" whether the kickbacks—which covered the period of 1952–1954—violated the Anti-Kickback Act as enacted in 1946, since that Act applied only to "cost

[16] H. Rep. No. 212, 79th Cong., 1st Sess., pp. 2, 5.

reimbursable" contracts while the contract here was a fixed price contract with a price redetermination clause (App. pp. 14–15). It is conceded, however, that these kickbacks violated the Anti-Kickback Act as amended in 1960, and that Congress explicitly made its amendment retroactive. (See 41 U.S.C. 51; S. Rep. 1585, p. 8, 86th Cong., 2d Sess.). In addition, the only appellate ruling on the question held the original 1946 Act applicable to price redetermination contracts as well as to "cost-plus" contracts. *United States* v. *Barnard*, 255 F. 2d 583, 588 (C.A. 10), certiorari denied, 358 U.S. 919. In these circumstances, and in light of the fact that the Acme officials involved in the kickback scheme here were guilty of "vicious and immoral" conduct, violating "obvious ethical or moral standards" (F. 31, App. pp. 65–66; cf. *Muschany* v. *United States*, 324 U.S. 49, 66–67), doubts as to the scope of the 1946 Act do not provide a basis for departing in this case from the ordinary rule that a contract found to be tainted with illegal and corrupt conduct should not be enforced.[17]

[17] The Court of Claims suggests that its ruling may not be important, since the government may draft a contract clause explicitly giving it the right to cancel for kickback violations. We are advised, however, that the Defense Department alone has awarded negotiated contracts at the rate of $22½ billion a year in fiscal year 1965, and is now awarding such contracts at an even higher rate. Even if a new contractual provision could be drafted for the future, a new clause would have no impact upon these contracts now in force.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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